

1 Ramon Rossi Lopez (admitted *pro hac vice*)  
2 (CA Bar No. 86361)  
3 LOPEZ McHUGH LLP  
4 100 Bayview Circle, Suite 5600  
5 Newport Beach, California 92660  
6 rlopez@lopezmchugh.com

7 Mark S. O'Connor (011029)  
8 GALLAGHER & KENNEDY, P.A.  
9 2575 East Camelback Road  
10 Phoenix, Arizona 85016-9225  
11 Telephone: (602) 530-8000  
12 mark.oconnor@gknet.com

13 *Attorneys for Plaintiffs*

14 James R. Condo (#005867)  
15 Amanda C. Sheridan (#027360)  
16 SNELL & WILMER L.L.P.  
17 One Arizona Center  
18 400 E. Van Buren, Suite 1900  
19 Phoenix, Arizona 85004-2202  
20 Telephone: 602.382.6000  
21 Facsimile: 602.382.6070  
22 jcondo@swlaw.com  
23 asheridan@swlaw.com

24 Richard B. North, Jr. (admitted *pro hac vice*)  
25 Georgia Bar No. 545599  
26 Matthew B. Lerner (admitted *pro hac vice*)  
27 Georgia Bar No. 446986  
28 NELSON MULLINS RILEY &  
SCARBOROUGH LLP  
201 17th Street, NW / Suite 1700  
Atlanta, GA 30363  
Telephone: (404) 322-6000  
Telephone: (602) 382-6000  
richard.north@nelsonmullins.com  
matthew.lerner@nelsonmullins.com

*Attorneys for Defendants C. R. Bard, Inc. and  
Bard Peripheral Vascular, Inc.*

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

IN RE: Bard IVC Filters Products Liability  
Litigation,

No. 2:15-MD-02641-DGC

**THE PARTIES' JOINT STATUS  
REPORT FOR THE JULY 13, 2017  
CASE MANAGEMENT  
CONFERENCE**

1 In accordance with Paragraph F.5 of Case Management Order No. 23 [Doc. 5770],  
 2 the Parties hereby submit their Joint Status Report for the July 13, 2017 Case  
 3 Management Conference.

4 **I. Discovery**

5 A. MDL Common Discovery

6 The Parties completed MDL common discovery on February 3, 2017. The  
 7 following depositions have been completed:

8	December 15, 2015	30(b)(6) re FDA Warning Letter
9	January 11, 2016	Kay Fuller
10	January 20, 2016	Continued 30(b)(6) re FDA Warning Letter
11	March 18, 2016	30(b)(6) re corporate structure
12	April 27, 2016	30(b)(6) re ESI systems structure
13	May 3, 2016	Murray Asch, M.D.
14	May 11, 2016	Carol Vierling
15	May 17, 2016	Anne Bynon
16	May 24, 2016	Len DeCant
17	June 2, 2016	John DeFord
18	June 9, 2016	Bret Baird
19	June 16, 2016	Robert DeLeon
20	June 17, 2016	Joe DeJohn
21	July 18, 2016	Abithal Raji-Kubba
22	July 27, 2016	Bill Little
23	July 27, 2016	Judy Ludwig
24	July 29, 2016	John Wheeler
25	August 9, 2016	Maureen Uebelacker
26	August 16, 2016	Daniel Orms
27	August 19, 2016	Mary Edwards
28	August 24, 2016	Cindi Walcott

1	August 30, 2016	30(b)(6) re REACH program
2	September 7, 2016	Steve Williamson
3	September 7, 2016	30(b)(6) re Sales/Marketing
4	September 7, 2016	Kevin Shifrin
5	September 16, 2016	Jack Sullivan
6	September 19, 2016	Brian Doherty
7	September 23, 2016	Holly Glass
8	September 29, 2016	John Van Vleet
9	October 11, 2016	Chris Ganser
10	October 18, 2016	Natalie Wong
11	November 3, 2016	Jack Sullivan (continued)
12	November 11, 2016	Robert Cortelezzi
13	December 6, 2016	David Peeler, M.D.
14	January 4, 2017	John Kaufman, M.D.
15	January 18, 2017	Michael Randall - 30(b)(6) Meridian/Denali
16	January 18, 2017	Kim Romney
17	January 19, 2017	Robert Carr - 30(b)(6) Key Opinion Leaders
18	January 20, 2017	Scott Trerotola, M.D.
19	January 24, 2017	Scott Randall
20	January 25, 2017	Gary Cohen, M.D.
21	January 26, 2017	Chad Modra - 30(b)(6) Failure Rate Thresholds
22	January 26, 2017	Anthony Venbrux, M.D.
23	January 30, 2017	Frank Lynch, M.D.
24	January 31, 2017	Mark Wilson
25	February 1, 2017	William Stavropoulos, M.D.
26	February 2, 2017	Mike Randall
27	February 2, 2017	Kevin Boyle
28	June 6, 2017	Rob Carr (Preemption Declaration)

1           B.     MDL Expert Disclosure and Discovery

2           Plaintiffs made their initial disclosures of expert witnesses on March 3, 2017 and  
3 their initial disclosures relating to the Meridian and Denali devices on April 7, 2017.

4 Those disclosures included the following witnesses:

5                     David W. Bates, M.D., MSc

6                     Rebecca Betensky, Ph.D.

7                     Mark J. Eisenberg, M.D.

8                     David Garcia, M.D.

9                     Steven M. Hertz, M.D.

10                    Sanjeeva Kalva M.D.

11                    David A. Kessler, M.D.

12                    Thomas Kinney, M.D., M.S.M.E.

13                    Robert M. McMeeking, Ph.D., NAE, FREng, FRSE, LFASME

14                    Robert O. Ritchie, Ph.D.

15                    Suzanne Parisian, M.D.

16                    Anne Christine Roberts, M.D.

17                    Michael B. Streiff, M.D.

18                    Robert L. Vogelzang, M.D.

19           Defendants made their initial disclosures of expert witnesses on April 14, 2017 and  
20 their initial disclosures relating to the Meridian and Denali devices on May 12, 2017.

21 Those disclosures included the following witnesses:

22                    Christine L. Brauer, Ph.D.

23                    Paul Briant, Ph.D., P.E.

24                    Audrey A. Fasching, Ph.D., P.E.

25                    David W. Feigal, Jr., M.D., M.P.H.

26                    Clement J. Grassi, M.D.

27                    Mark W. Moritz, M.D.

28                    Christopher S. Morris, M.D.

1 Frederick B. Rogers, M.D., FACS

2 Moni Stein, M.D., FSIR

3 Ronald A. Thisted, Ph.D.

4 Donna Bea Tillman, Ph.D., M.P.A.

5 Plaintiffs made their rebuttal disclosures of expert witnesses on May 12, 2017.

6 Those disclosures included the following witnesses:

7 Rebecca Betensky, Ph.D.

8 Kush Desai, M.D.

9 Mark J. Eisenberg, M.D.

10 Steven M. Hertz, M.D.

11 Robert M. McMeeking, Ph.D.

12 Robert O. Ritchie, Ph.D.

13 Robert L. Vogelzang, M.D.

14 The following expert depositions have been taken:

15 May 9, 2017 David W. Bates, M.D., MSc (class-action)

16 May 16, 2017 Steven M. Hertz, M.D. (class-action)

17 May 17, 2017 Christopher S. Morris, M.D.

18 June 5, 2017 Robert L. Vogelzang, M.D.

19 June 6, 2017 Kush Desai, M.D.

20 June 9, 2017 Robert O. Ritchie, Ph.D.

21 June 15, 2017 Clement J. Grassi, M.D.

22 June 17, 2017 Thomas Kinney, M.D., M.S., M.E.

23 June 21, 2017 David L. Garcia, M.D.

24 June 21, 2017 Suzanne Parisian, M.D.

25 June 21, 2017 Anne Christine Roberts, M.D.

26 June 23, 2017 Rebecca Betensky, Ph.D.

27 June 26, 2017 Audrey Fasching, Ph.D., PE

28 July 6, 2017 Mark J. Eisenberg, M.D., MPH, FACC, FAHA

July 6, 2017 Robert M. McMeeking, Ph.D., NAE, FREng,  
FRSE, LFASME

The following expert witness depositions are scheduled:

July 7, 2017 Anne Christine Roberts, M.D.

July 11, 2017 Sanjeeva Kalva, M.D.

July 12, 2017 Michael B. Streiff, M.D.

July 13, 2017 Paul Briant, Ph.D, PE

July 18, 2017 Mark W. Moritz, M.D.

July 18, 2017 Frederick B. Rogers, M.D., MS, FACS

July 20, 2017 David W. Feigal, Jr., M.D., MPH

July 21, 2017 Darren R. Hurst, M.D.

July 24, 2017 Derek D. Muehrcke, M.D.

July 25, 2017 Christopher S. Morris, M.D.

July 26, 2017 J. Matthew Sims, M.C., M.S.

July 28, 2017 Ronald A. Thisted, Ph.D.

July 31, 2017 David A. Kessler, M.D.

July 31, 2017 Moni Stein, M.D.

August 2, 2017 Christine L. Brauer, M.D., Ph.D.

August 4, 2017 Robert O. Ritchie, Ph.D. (continued)

August 4, 2017 Donna Bea Tillman, Ph.D.MPA, FRAPS

August 4, 2017 Lora K. White, RN, BSN, CNLCP, CCM,  
MSCC

C. Barazza Class Action Discovery

The Parties have completed the depositions of the named plaintiffs. The following depositions were taken:

October 19, 2016 Diane Washington

October 28, 2016 James Holt

November 10, 2016 Gregory Lester

November 16, 2016	Maria Barazza
November 30, 2016	Edward Mims
December 1, 2016	Nancy Mosher
December 6, 2016	Thomas Flournay
December 6, 2016	Delmar Lee Peck
December 15, 2016	Denise Tomlin
January 24, 2017	John Van Vleet
February 27, 2017	Linda Walker
May 11, 2017	Ana Hernandez

The Parties have designated and disclosed experts on class certification issues, including Plaintiffs' rebuttal expert reports. Many of those class certification experts are also the same experts in the general MDL and have been deposed (or are scheduled to be deposed) at the same time for both the MDL and the class action.

D. Bellwether Group 1 Depositions

1. Fact Discovery

In addition to the numerous fact witness depositions taken by the Parties before the last status conference, the Parties have scheduled or have already taken the following fact witness depositions in the five Bellwether case since that status conference:

May 31, 2017	Angelic Thompson (Mulkey)
May 31, 2017	Lorelie Thompson (Mulkey)
May 31, 2017	Torin Walters, M.D. (Mulkey)
June 1, 2017	Pho Nguyen, M.D. (Mulkey)
June 15, 2017	Brandon Kang, M.D. (Booker)
June 20, 2017	Richard Harvey, M.D. (Booker).
June 26, 2017	Eric Hairston (Booker)
June 27, 2017	Brody Puckett (Kruse, postponed due to illness)
July 7, 2017	Amy Sparks, M.D. (Hyde)
July 11, 2017	Colleen Taylor, M.D. (Jones)

July 12, 2017 Aaron Donner (Mulkey)

August 3, 2017 Chris Smith (Jones)

August 3, 2017 Tim Hug (Hyde)

The parties are also working on coordinating a date for the deposition of Bryan Vogel, a BPV employee in field assurance.

Per CMO 25 (Doc. 6227), the deadline for deposing medical witnesses (treating physicians) is August 7, 2017, and the deadline for deposing all other fact witnesses is August 15, 2018.

2. Case-Specific Expert Disclosures and Discovery

On June 5, 2017, Plaintiffs disclosed case-specific expert reports by the following expert witnesses in all five bellwether cases:

Darren Hurst, M.D.

Derek D. Muehrcke, M.D.

On June 5, 2107, Plaintiffs disclosed the case-specific expert report of David Garcia, M.D. in the Jones bellwether case.

On June 9, 2017, in accordance with the agreement of the Parties, Plaintiffs disclosed case-specific expert reports by Robert M. McMeeking, Ph.D., NAE, FREng, FRSE, LFASME in all five bellwether cases.

On June 12, 2017, in accordance with the agreement of the Parties, Plaintiffs disclosed case-specific expert reports by the following expert witnesses in all five bellwether cases:

Robert O. Ritchie, Ph.D.

J. Matthew Sims, MC, MS & Lora K. White, RN, BSN, CNLCP, CCM,  
MSCC

On July 3, 2017, Defendants disclosed case-specific expert reports for the following expert witnesses:

Mark W. Moritz, M.D.

Christopher S. Morris, M.D.



1                   Moni Stein, M.D., FSIR

2           The Parties have agreed that Defendants may have until July 13, 2017 to disclose  
3 certain medical experts in the Hyde and Booker and to disclose their engineering experts'  
4 case-specific opinions by that same date.

5           Per CMO 25, Plaintiffs are required to file their rebuttal case-specific expert  
6 disclosures for Bellwether Group I by July 17, 2017, the depositions of all case-specific  
7 experts (other than medical witnesses) must be completed by August 7, 2017, and the  
8 completion of depositions of non-medical witnesses must be completed by August 15,  
9 2017. [Doc. 6227]

10   **II.   Plaintiffs' Request to Take Trial Deposition of Dr. Henry in Booker Case.**

11           In their bellwether submission, Plaintiffs noted their request to take a trial  
12 deposition of the implanting physician in the Hyde case, Dr. David A. Henry. At the last  
13 Case Management Conference, this Court stated: "Before ruling that the plaintiffs can  
14 redepose the doctors, I would want to look at those depositions and understand the  
15 arguments." Defendants do not agree that a trial deposition of Dr. Henry is appropriate.

16           The Parties' respective positions are set forth below:

17    A.   Plaintiffs' Position

18           During the depositions of Dr. Henry, Plaintiff Lisa Hyde's treating physician who  
19 implanted her G2X IVC filter, Dr. Henry's counsel repeatedly interposed inappropriate  
20 objections and instructed Dr. Henry not to answer questions on grounds not permitted in  
21 the Rules of Civil Procedure.

22           The effect of those inappropriate objections and instructions was that Plaintiff was  
23 precluded from obtaining trial usable testimony from Dr. Henry. Plaintiffs have attached  
24 as **Exhibit A** to this report multiple examples of such interfering objections and  
25 instructions. In accordance with the Court's statement at the last Case Management  
26 Conference, Plaintiffs will separately submit under seal the entire transcript for the Court  
27 for the Court to review.  
28

1 Plaintiffs contend that, had Dr. Henry been examined at trial, this Court would not  
 2 have permitted such restricted testimony resulting from such positions and behavior by  
 3 counsel for the witness and that Plaintiffs would have had the opportunity to elicit, and the  
 4 jury would have had the opportunity to hear, without unnecessary interruption, Dr.  
 5 Henry's testimony regarding the care and treatment of plaintiff and the information that he  
 6 considered or would have considered important in deciding to recommend the G2X filter  
 7 for Plaintiff Lisa Hyde. In particular, Dr. Henry's attorney completely precluded  
 8 Plaintiffs from examining Dr. Henry regarding information in Bard's internal documents  
 9 that predated his implantation of the filter in Ms. Hyde – important information for the  
 10 jury to assess in light of Bard's assertion of the learned-intermediary affirmative defense.

11 Accordingly, Plaintiffs respectfully request the Court permit them to take a trial  
 12 deposition of Dr. Henry with either a special master present to control the conduct of  
 13 counsel and the witness or with the Court present telephonically as trial judge for the  
 14 deposition.

#### 15 B. Defendants' Position

16 The deposition of Dr. David Henry, who placed Ms. Hyde's G2X Filter, should not  
 17 be reconvened. First, although Dr. Henry's counsel instructed him not to answer  
 18 approximately five to seven questions during the deposition, the questions called for  
 19 expert testimony (i.e., present opinions that were not formed during the treatment of Ms.  
 20 Hyde), which is inappropriate under Wisconsin law. *See Alt v. Cline*, 589 N.W.2d 21, 25-  
 21 26 (Wis. 1999) (discussing the basis in substantive Wisconsin law for the privilege "to  
 22 refuse to testify if the expert is called by a litigant" unless the witness consents to be an  
 23 expert). Counsel for Dr. Henry explained the law, why counsel's questions called for  
 24 expert opinions, and how the questions could be rephrased. *See, e.g.*, David Henry Dep.  
 25 Tr., 21:18 to 22:8; 26:7 to 27:16; 28:17-21; 29:15-23; 30:21 to 31:13; 31:23 to 34:8; 44:2-  
 26 18; 87:25 to 88:4, excerpts attached as **Exhibit B**.

27 Second, even if the questions did not call for expert opinions, any objections that  
 28 counsel for Ms. Hyde perceived as inaccurate could have been met by rephrasing the

1 questions, which counsel did in several instances, so that they were tied to Dr. Henry's  
2 treatment of Ms. Hyde.

3 Third, at the deposition, counsel could have called the Court when he thought that  
4 his examination was being so prejudiced that the deposition would need to be reconvened.  
5 For each of these reasons, requiring Bard and a third party witness to reconvene a  
6 deposition in Wisconsin to answer five to seven questions is not warranted.

### 7 **III. Plaintiffs' Request to Depose Dr. Altonaga**

8 Plaintiffs have requested to depose Dr. William Altonaga, the Medical Director at  
9 Bard during the relevant time period, in the bellwether cases. Under CMO 23, Discovery  
10 Protocols for Bellwether Group 1 [Doc. 5881], the Court ordered that no more than five  
11 depositions of case relevant fact (non-expert) witnesses could be taken in each Bellwether  
12 Group I case, and that "[t]hese depositions may include Bard present or former employees  
13 only if the depositions will likely produce probative evidence that could reasonably have  
14 been obtained during general discovery." Bard has opposed the request.

15 The Parties submit their respective positions as follows:

#### 16 **A. Plaintiffs' Position**

17 Dr. Altogana was Bard's medical director throughout the time period relevant to  
18 the devices in the bellwether cases. In that role, he was responsible for reviewing the  
19 available information with respect to those devices and ensuring their safety and efficacy.  
20 As such, he had particular responsibility to stay apprised of developments and problems  
21 with filters including those at issue in the bellwether cases before and after they entered  
22 the market. He was also responsible to make decisions regarding the devices at issue in  
23 the bellwether cases (G2, G2X, and Eclipse) and whether they were sold, marketed, and  
24 what warnings Bard would give relating to them, including in the IFUs.

25 Specific to the bellwether cases, Plaintiffs expect that Dr. Altonaga will provide  
26 testimony regarding his knowledge of developments and problems associated with filters  
27 before and after they entered the market and also his decisions as medical director specific  
28 to the particular devices and relevant timings for each Plaintiff. Further, as medical

1 director, Dr. Altonaga is responsible to prepare reports including Health Hazard  
2 Evaluations regarding filter problems and adverse events. For example, his knowledge of  
3 adverse events relating to the G2 and G2X devices as well as internal tracking and  
4 trending of those events at the time that Lisa Hyde's G2X filter was implanted in February  
5 2011 and as it remained in her body until August 2014 are highly probative of issues in  
6 Ms. Hyde's case. Similarly, his recommendations and actions as medical director with  
7 respect to the G2X at those times are particularly relevant to Ms. Hyde's claims. Dr.  
8 Altonaga has similarly relevant knowledge and information for the devices implanted in  
9 the other bellwether plaintiffs (the G2 and Eclipse filters) on the pertinent dates in each of  
10 those cases.

11 Although Dr. Altonaga was deposed in a state-court IVC filter case prior to the  
12 MDL, that deposition did not address the facts and issues specific to these cases. He was  
13 deposed in a case in San Diego County in October 2013. That case, Giordano, involved a  
14 specific and unique set of facts – distinct from the bellwethers and nearly all the cases in  
15 this MDL. In particular, the plaintiff suffered a perforation and exsanguination that led to  
16 her death. That injury is simply one that is not present in any of these bellwether cases,  
17 and exists rarely, if at all, across the MDL.

18 Further, Dr. Altonaga was primarily examined about the time period prior to when  
19 he became medical director (and, thus, prior to the time period of the devices in the  
20 bellwether cases). And, of the eight exhibits marked at his deposition, seven were  
21 corporate documents from the time period prior to when he was medical director.

22 Dr. Altonaga has never been deposed regarding the time period at issue for these  
23 bellwether cases, and he has never been deposed on the particular facts of these cases and  
24 his knowledge – as the top medical person at the company – at the particular times  
25 relevant to these cases. He was not deposed regarding the adverse events,  
26 tracking/trending, and decisions made regarding the bellwether devices. Nor was he  
27 examined regarding any of the injuries in the bellwether cases.  
28

1 Plaintiffs note that, other than Dr. Altonaga, they have not requested the deposition  
2 of any other “corporate” witness in the bellwethers other than the sales representatives  
3 deposed in the first phase of discovery or the immediate supervisors of those sales  
4 representatives and one adverse event investigator who investigated at least two of the  
5 bellwether cases. And, Plaintiffs did not seek to depose Dr. Altonaga during common  
6 discovery precisely because his testimony is more appropriate in case-specific context  
7 because of the direct particular relevance of his knowledge at specific dates

8 B. Defendants’ Position

9 As a part of bellwether discovery, Plaintiffs are seeking to depose Dr. Bill  
10 Altonaga, the former medical director of Bard Peripheral Vascular. However, Dr.  
11 Altonaga has no knowledge specific to the bellwether cases. Further, before the creation  
12 of this MDL, Dr. Altonaga was deposed by a member of the Plaintiffs’ Steering  
13 Committee (with the Plaintiffs’ co-lead counsel participating by telephone) for almost 7  
14 hours. That deposition focused on a wide array of general issues regarding Bard’s filters,  
15 and in no way focused on the facts of the case in which it was noticed. Thereafter,  
16 Plaintiffs did not once ask to re-depose Dr. Altonaga again in this MDL during the year  
17 afforded for general fact discovery.

18 Case Management Order No. 24 [Doc. 5883] states that the depositions taken as a  
19 part of bellwether discovery “may include Bard present or former employees only if the  
20 depositions will likely produce probative evidence that could not reasonably have been  
21 obtained during general discovery.” Here, Plaintiffs have made no effort to make the  
22 showing required by Case Management Order No. 24. Nor could they. Plaintiffs could  
23 readily have requested an additional deposition of Dr. Altonaga as a part of the dozens of  
24 comparable depositions they took during the year-long period of fact discovery, and  
25 covered the same general issues they now mention, but clearly chose not to do so.  
26 Plaintiffs should not be permitted now to extend general fact discovery (which concluded  
27 in February) under the guise of taking additional corporate depositions during the  
28 bellwether discovery phase.

1 Bard also notes that it has cooperated with Plaintiffs to arrange depositions during  
 2 this phase of past and present Bard employees with specific knowledge potentially  
 3 relevant to the bellwether cases. Dr. Altonaga, however, presents a different issue, as he  
 4 has no information specific to these bellwether plaintiffs, and any general information he  
 5 has could have been readily “obtained during general discovery.”

#### 6 **IV. Discoverability of Communications Between or Among Plaintiffs’ Experts**

7 Several of Plaintiffs’ expert reports were written by more than one expert.  
 8 Defendants have requested production of correspondence exchanged among the authors of  
 9 these jointly written reports that in any way relate to this case or the expert reports they  
 10 jointly drafted. They do not seek production of the draft reports themselves. Plaintiffs have  
 11 objected to these requests to the extent that such communications are protected from  
 12 discovery under the Federal Rules of Civil Procedure and include communications with  
 13 Plaintiffs’ counsel that are protected work product.

14 The plaintiffs have produced the following jointly written expert reports:

- 15 • David Garcia, M.D. and Michael B. Streiff, M.D.
- 16 • Sanjeeva Kalva, M.D., Thomas Kinney, M.D., M.S.M.E., and Anne Christine  
 17 Roberts, M.D.
- 18 • Robert L. Vogelzang, M.D. and Kush R. Desai, M.D.
- 19 • J. Matthew Sims, MC, MS & Lora K. White, RN, BSN, CNLCP, CCM,  
 20 MSCC

21 The Parties provide their respective positions as follows:

#### 22 A. Defendants’ Position

23 At the outset of expert discovery, the Parties agreed that document requests could  
 24 be served on the expert witnesses with the deposition notices, and that subpoenas would  
 25 not be necessary. Defendants’ deposition notices to the Plaintiffs’ experts requested “all  
 26 communications and emails between you and any fact or expert witness in the Case[.]”  
 27 Some of the deposition notices also requested certain witnesses to provide “all  
 28 communications and emails between you and other physicians at Northwestern or

Interventional Cardiologist's LLC that relate in any way to the Case, the Report of Robert L. Vogelzang, M.D. (signed March 2, 2017), or the Medical Monitoring (Morris) Rebuttal Report of Kush R. Desai, M.D. and Robert L. Vogelzang, M.D. (signed April 19, 2017)[.]”<sup>1</sup> See also Am. Dep. Notice of David Garcia M.D. (signed May 6, 2017)<sup>2</sup> (requesting “all communications and emails between you and Dr. Michael Streiff that relate in any way to the Case or the expert reports you and Dr. Michael Streiff submitted in this case.”).

Because the plaintiffs submitted jointly written expert reports, Bard narrowly seeks the communications among the authors of these reports that relate to this case or the drafting or contents of the reports, but not the draft reports themselves. This limited group of communications is relevant and not subject to work-product protection.<sup>3</sup>

Rule 26 limits work-product protection to communications between counsel for a party and that party's testifying expert witness. See Fed. R. Civ. P. 26(b)(4)(C). As the Advisory Committee notes to the 2010 Amendments make clear, “inquiry about communications the expert had with anyone other than the party's counsel about the opinions expressed is unaffected by the rule.” Advisory Committee Notes to 2010 Amendment, Fed. R. Civ. P. 26. The Ninth Circuit, as well as other appellate and district courts, likewise have ruled that an expert's communications with non-attorneys are discoverable. See *Republic of Ecuador v. Mackay*, 742 F.3d 860, 870 (9th Cir. 2014)

---

<sup>1</sup> According to their expert report, Dr. Vogelzang and Dr. Desai wrote their report with Scott Resnick, M.D. and Robert Lewandowski, M.D. All four physicians are colleagues at Northwestern Memorial Hospital. Consequently, Defendants are seeking communications among all four authors of the report and their notes regarding those communications.

<sup>2</sup> See Exhibit A(2)(a)(vi), (vii), and (viii) to exemplar Deposition Notices of Plaintiffs Experts Desai and Garcia attached here as **Exhibit C**.

<sup>3</sup> Defendants have met and conferred on this issue with Plaintiffs on multiple occasions, including during an expert deposition, through a followup meet and confer letter, and then, after the meet and confer letter was sent, during calls with Plaintiffs' counsel. Because a number of expert depositions are scheduled that will be impacted by this issue, Defendants believe that resolution of this issue is needed so that the remaining expert depositions can be completed timely.



1 (“Rule [26] allows for discovery of . . . communications the expert had with anyone other  
 2 than the party's counsel about the opinions expressed.”); *Republic of Ecuador v. Hinchee*,  
 3 741 F.3d 1185, 1189-92 (11th Cir. 2013) (finding that a testifying expert’s  
 4 communications with other experts were discoverable); *Republic of Ecuador v. Bjorkman*,  
 5 735 F.3d 1179 (10th Cir. 2013) (affirming order compelling discovery of communications  
 6 between testifying expert and non-attorneys); *Whole Women's Health v. Lakey*, 301  
 7 F.R.D. 266, 268-71 (W.D. Tex. 2014) (finding that communications between testifying  
 8 experts and a non-testifying consulting expert were generally discoverable); *United States*  
 9 *v. Veolia Evnt. N. Am. Ops., Inc.*, No. CV 13-MC-03-LPS, 2014 WL 5511398, at \*7 (D.  
 10 Del. Oct. 31, 2014), amended, No. CV 13-MC-03-LPS, 2014 WL 6449973 (D. Del. Nov.  
 11 17, 2014) (ordering discovery of communications between testifying experts and non-  
 12 attorneys).

13 Moreover, the fact that counsel may have been “copied” on such communications  
 14 does not impact discoverability of the communications. *See In re Application of Republic*  
 15 *of Ecuador v. Douglas*, 153 F. Supp. 3d 484, 491–92 (D. Mass. 2015) (ordering that  
 16 testifying expert’s “communications with non-attorneys—including communications in  
 17 which attorneys are merely copied, but in which no attorney work product exists—must  
 18 be provided.”).

19 Because the communications are relevant and not protected by the work-product  
 20 doctrine, the Court should permit the limited discovery of correspondence exchanged  
 21 among the authors of jointly written reports (including Dr. Resnick and Dr. Lewandowski)  
 22 that in any way relate to this case or concerning the drafting or contents of the reports.

### 23 B. Plaintiffs’ Position

24 Plaintiffs contend that this issue is not ripe for the Court’s consideration. Bard  
 25 raised this issue mere days before the delivery of its draft of the joint report, and there has  
 26 not been a proper meet and confer between the Parties. Indeed, Bard first contended that  
 27 it seeks “the communications among the authors of these [joint] reports that relate to the  
 28 drafting or contents of the reports” (as distinct from the broader categories of its document



1 subpoena list to experts) shortly before the parties exchanged drafts and filed this report.  
2 Plaintiffs do not, at present, even know what, if any, documents exist that would be  
3 responsive to this request were it proper.

4 Moreover, Bard's request runs directly contrary to Federal Rule of Civil Procedure  
5 26(b)(4)(B), which precludes discovery of drafts of an expert's report. Here, Bard does  
6 not address Rule 26(b)(4)(B) and ignores that the communications between joint authors  
7 of a report regarding the "drafting or contents of the reports" is essentially asking for  
8 drafts of the reports themselves. *See, e.g., In re Application of Republic of Ecuador*, 280  
9 F.R.D. 506, 512-513 (N.D. Ca. 2012) ("Amended Rule 26 provides work product  
10 protection for draft reports and disclosures required under Rule 26(b)(3)(A) and (B),  
11 regardless of the form in which the draft is recorded"); *United States v. Veolia*  
12 *Environnement N. Am. Ops., Inc.*, 2014 WL 5511398, at \*5 (Oct. 31, 2014) ("documents'  
13 contents reveal them to be draft reports, demonstrating counsel's collaborative  
14 interactions with expert consultants—notwithstanding the form these documents take").

15 Subject to the above, Plaintiffs have not objected to the production of  
16 communications by and between their experts except to the extent that those  
17 communications are work-product communications between Plaintiffs' counsel and the  
18 experts. Such communications are undeniably protected under Federal Rule of Civil  
19 Procedure 26(b)(4)(C). And, while "inquiry about communications the expert had with  
20 anyone other than the party's counsel about the opinions expressed is unaffected by the  
21 rule," Advisory Committee Note to Fed. R. Civ. P. 26, Plaintiffs have not objected to the  
22 production of any such communications. Contrary to Bard's suggestion, Plaintiffs have not  
23 objected to communications between experts and others on which counsel were merely  
24 "copied."

25 Plaintiffs are not aware that the identified experts have withheld any  
26 communications by and between the joint authors of their reports that did not involve  
27 information protected under Federal Rule of Civil Procedure 26(b)(4)(B) or (C). Plaintiffs  
28 are in the process of determining whether any such documents exist.

1 **V. Defendants’ Motion for Summary Judgment on Preemption**

2 Defendants filed a motion for summary judgment based on preemption on March  
3 24, 2017 [Doc. 5397]. In accordance with CMO 23, Defendants made Bard employees  
4 Robert Carr and John Van Vleet available for depositions. Mr. Carr was deposed on June  
5 6, 2017. Although Mr. Van Vleet was scheduled to be deposed on June 16, Plaintiffs  
6 withdrew their request to depose him.

7 In accordance with CMO 23, the Parties submitted their respective positions  
8 regarding the remaining schedule relating to discovery, expert discovery, response to  
9 Defendants’ Motion for Summary Judgment Regarding Preemption, and the schedule for  
10 briefing on Defendants’ Motion and Incorporated Memorandum to Seal. [Doc. 5872].  
11 That proposal is pending before the court.

12 Plaintiffs’ request to revise their proposed schedule, as set forth in the Parties’ Joint  
13 Submission, to include July 21, 2017, for service of their expert report. Plaintiffs’ submit  
14 this change to accommodate the schedule of their expert.<sup>4</sup>

15 Defendants oppose the Plaintiffs’ attempt to unilaterally revise the deadline for  
16 their submission of expert reports on the preemption issues, because Plaintiffs have made  
17 no prior effort to meet and confer with Defendants regarding that issue and have not  
18 addressed (much less discussed with Defendants) how the change of that deadline will  
19 impact the related deadlines in the proposed schedule. Plaintiffs’ dismissal of the need to  
20 meet and confer on that issue overlooks the fact that both parties’ proposed schedules built  
21 off the same deadline for plaintiffs’ disclosure of expert reports.

22 Finally, Parties recently submitted a motion to revise the briefing schedule relating  
23 to the Motion to Seal because of issues arising from an inadvertent production of Bard  
24  
25

---

26 <sup>4</sup> Bard’s “opposition” to Plaintiffs’ request to change one date in Plaintiffs’ proposed  
27 schedule for briefing on the preemption motion lacks merit. There is not agreed or set  
28 schedule yet; and the proposed schedule at issue is Plaintiffs’ proposal; not a joint one.  
Plaintiffs have not proposed to change any other date in their proposed schedule – only to  
move their expert disclosure one week.

documents from FOIA services. That joint motion is pending before the Court. [Doc. 6477].

#### **VI. Procedures for Medical Monitoring Class Certification Hearing**

Per Amended CMO 16 [Doc. No. 4141], the Court will hold a class certification hearing at 2:30 pm on August 11, 2017. During the upcoming status conference, the Parties would appreciate the opportunity to discuss with the Court its preferences for the hearing, whether the Court wants the parties to present evidence of any expert or fact witnesses, and the amount of time that will be allotted to each side for the hearing.

#### **VII. Science Day Proposed Procedure**

The Parties have discussed the timing and procedure for the upcoming science day.

The Parties anticipate and propose that each side be allocated two hours for their presentations. If the Court has availability, the Parties propose conducting the Science Day on August 10, the day before the hearing on the motion for class certification. The Parties would appreciate having an opportunity to discuss with the Court its preferences and expectations regarding Science Day presentations during the upcoming status conference.

#### **VIII. Miscellaneous Motions**

##### **A. Motion to Disqualify Plaintiffs' Expert Dr. Kinney**

Defendants' motion to disqualify one of the plaintiffs' experts, Dr. Thomas Kinney [Doc. 5677], has been filed and is fully briefed. The Parties will be prepared to address any questions the Court may have, if any, relating to that motion at the upcoming status conference.

##### **B. Motion to Disqualify Plaintiffs' Experts Drs. Vogelzang and Desai**

Defendants wish to alert the Court that it anticipates filing in the near future a motion to disqualify two more of Plaintiffs' experts, Drs. Vogelzang and Desai. These doctors are members of the Division of Interventional Radiology at Northwestern Memorial Hospital in Chicago and submitted a joint report on behalf of Plaintiffs which they both signed. According to their joint report and their deposition testimony, they

1 wrote their report in conjunction with their colleagues at Northwestern, Scott Resnick,  
2 M.D. and Robert Lewandowski, M.D.

3 In their motion, Defendants will contend that Drs. Vogelzang and Desai should be  
4 disqualified because Dr. Resnick actively collaborated in drafting their report. Dr. Resnick  
5 is a current consultant for Bard Peripheral Vascular, Inc., and is subject to various  
6 confidentiality obligations to Bard. In addition, Dr. Resnick has recently consulted with  
7 Bard's counsel in at least one Bard IVC filter case involving members of the Plaintiffs'  
8 Steering Committee. Dr. Resnick is also a signatory to a retention agreement regarding  
9 that work. As a consequence, Defendants contend that Dr. Resnick has a clear conflict of  
10 interest that would warrant his disqualification as an expert witness. Because of his active  
11 collaboration with Drs. Vogelzang and Desai in the preparation of those reports,  
12 Defendants contends that Dr. Resnick's conflict in turn taints the other experts with the  
13 result that they should be excluded.

14 Plaintiffs will respond to Bard's anticipated motion in due course when filed.  
15 However, Plaintiffs note that, once again, Bard has failed to provide any substance in  
16 support of its allegations. Bard has provided no proof that it provided any protected  
17 information to Dr. Resnick; it has provided no proof that, if Dr. Resnick possessed  
18 protected information, he actually shared that information with Drs. Vogelzang and Desai;  
19 and it has provided no proof that Drs. Vogelzang and Desai have relied on any protected  
20 information in coming to their conclusions. Quite to the contrary, Bard deposed both  
21 expert witnesses and failed to raise any of the foregoing issues with either of them –  
22 despite the express disclosure in their reports of the fact that they work with Dr. Resnick  
23 and wrote their report "in conjunction with" him.

24 Dr. Resnick is not a testifying expert retained by Plaintiffs; he is a colleague of  
25 Drs. Vogelzang and Desai at Northwestern Memorial Hospital in the Division of  
26 Radiology Studies. Moreover, the reports and opinions of Drs. Vogelzang and Desai are  
27 based solely on publicly available information, identified documents that were disclosed  
28 in this litigation, and their own education, training, and clinical experience. They have not

1 relied on any protected work-product information of Bard from any source, including Dr.  
2 Resnick (assuming he has any such information).

3 Further, as with Dr. Kinney, the timing of Bard's raising this issue is highly  
4 prejudicial to Plaintiffs. Bard has known about the Plaintiffs' experts', Drs. Vogelzang  
5 and Desai, relationship to Dr. Resnick (who Bard claims was its consultant) since at least  
6 March 3 of this year when Plaintiffs served the first expert report of Dr. Vogelzang. That  
7 report disclosed the relationship with Dr. Resnick. Nonetheless, Bard first raised its claim  
8 that Dr. Resnick was its consultant and its intended motion very recently – even after the  
9 depositions of Drs. Vogelzang and Desai. Were disqualification of two of Plaintiffs'  
10 experts warranted and an appropriate remedy (which neither is), the timing – after experts  
11 have been disclosed and expert discovery is closed – would be unfairly prejudicial to  
12 Plaintiffs.

### 13 **VIII. Scheduling Issues Leading to Bellwether Trials**

14 Plaintiffs request to discuss with the Court the timing and procedure leading up to  
15 the trial of the bellwether cases. In particular, Plaintiffs would like to discuss potential  
16 dates and timing for the trial setting(s), the pretrial conference(s), the procedures and  
17 process for the parties to address objections and admissibility of trial exhibits and the  
18 designation of deposition testimony.

### 19 **IX. Resolution of Choice-of-Laws or Conflicts-of-Law Issues in Bellwether Cases**

20 The Parties have discussed that several of the bellwether cases may involve choice-  
21 of-law/conflicts-of-laws issues that are likely to impact the briefing on any summary  
22 judgment motions filed with respect to those cases. Plaintiffs would like to address with  
23 the Court how it would like to handle resolution of the choice-of-law/conflicts-of-laws  
24 issues.

Respectfully submitted this 7th day of July 2017.

GALLAGHER & KENNEDY, P.A.

SNELL & WILMER L.L.P.

By: s/ Paul L. Stoller

Mark S. O'Connor (011029)  
Paul L. Stoller (016773)  
2575 East Camelback Road  
Phoenix, Arizona 85016-9225

Ramon Rossi Lopez  
(admitted *pro hac vice*)  
CA Bar No. 86361  
LOPEZ McHUGH LLP  
100 Bayview Circle, Suite 5600  
Newport Beach, California 92660  
*Attorneys for Plaintiffs*

By: s/ Richard B. North

James R. Condo (005867)  
Amanda C. Sheridan (027360)  
One Arizona Center  
400 E. Van Buren, Suite 1900  
Phoenix, Arizona 85004-2202

Richard B. North, Jr. (admitted *pro hac vice*)  
Georgia Bar No. 545599  
Matthew B. Lerner (admitted *pro hac vice*)  
Georgia Bar No. 446986  
Nelson Mullins Riley & Scarborough LLP  
201 17th Street, NW / Suite 1700  
Atlanta, GA 30363  
*Attorneys for C. R. Bard, Inc. and Bard  
Peripheral Vascular, Inc.*

### **CERTIFICATE OF SERVICE**

I hereby certify that on July 7, 2017, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to all attorneys of record.

s/ Deborah Yanazzo